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Supreme Court of the United States

OCTOBER TERM, 1936

No. 575.

WILLIAM ELMER BROWN, JR.,
Petitioner,

vs.

EDWARD J. O'KEEFE, Receiver of THE UNION NATIONAL BANK OF ATLANTIC CITY, N. J.,
Respondent.

ON CERTIORARI.

Petitioner's Brief

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vs.

EDWARD J. O'KEEFE, Receiver of THE UNION NATIONAL BANK OF ATLANTIC CITY, N. J.,
Respondent.

ON CERTIORARI.

PETITIONER'S BRIEF.

I.

OPINIONS OF THE COURT BELOW.

The opinion of the District Court was written by District Judge John Boyd Avis and filed July 19, 1935. It is reported in 16 F. Supp. 494, and appears on page 47 of the Record. The two opinions of the Circuit Court of

Appeals (Circuit Judges Buffington, Davis and Thompson, Judge Buffington writing) were filed January 24, 1936, and September 24, 1936. The first of said opinions is not reported but appears on page 70 of the Record. The latter opinion is reported in 85 Fed. (2d) 885, and appears on page 82 of the Record.

Reference is made in this brief to the District Court opinion. This is made necessary because that opinion was adopted and accepted by the Circuit Court of Appeals as satisfactory basis and reasoning for its affirmance. It said (R. 83) "the Judge in an exhaustive and to us, satisfactory opinion, held that the statutory liability of the defendant to future assessment was not a provable claim and consequently was not discharged."

II.

STATEMENT OF THE CASE.

The Receiver of the Union National Bank of Atlantic City, N. J., instituted suit in the United States District Court for the District of New Jersey to recover assessment made by the Comptroller of the Currency of the United States upon the capital stock of said bank alleged to be owned by petitioner. (R. 3 to 5, incl.)

Petitioner filed answer thereto denying ownership of the stock (paragraph 3, R. 6), and charged that petitioner's liability to assessment was a provable debt or claim fixed or capable of liquidation at the time of petitioner's adjudication and discharge in bankruptcy and so, therefore, was discharged because (a) said liability was as a surety; (b) said liability was a debt or liability founded on implied contract; (c) said liability had occurred at the time of

and prior to petitioner's discharge; (d) said Union National Bank became insolvent, closed its doors, and went into voluntary liquidation before petitioner's bankruptcy; and (e) said liability was capable of being enforced at the time of petitioner's bankruptcy. (R. 6 to 18, incl.)

The respondent (plaintiff below) moved to strike petitioner's answer and enter summary judgment alleging the answer was sham and the defenses were frivolous. (R. 19 to 24, incl.) Supporting affidavits were filed. (R. 25 to 31, incl.) This was in pursuance of provisions of the New Jersey Practice Act which, in a proper case, permits the striking of an answer and defenses as sham or frivolous (N. J. Pamphlet Laws 1912, c. 231, p. 380), but this is only permissible where it is patent that there is no possible question of fact for the consideration of the jury. Plaintiff's averment that the defenses set up in the answer were frivolous necessarily carried with it the admission (for the purpose of the motion) of the truthfulness of the allegations of said defenses.

Petitioner herein filed an answering affidavit on said motion (R. 33 to 42, incl.), whereby it was proven that *said Union National Bank was insolvent on September 30, 1931,* and, therefore, unable to continue its business; that on that date it entered into agreement with the Atlantic City National Bank (a copy of which was attached to said affidavit, R. 38), providing for its liquidation and in pursuance thereof discontinued its business and delivered all its assets to said Atlantic City National Bank; that *said Union National Bank was placed in voluntary liquidation in accordance with Sections 5220 and 5221 of the United States Revised Statutes* (Act of Cong., June 3, 1864, c. 106, §42, 13 Stat. 112; 12 U. S. C. A. §181 and 182), *the same to take effect December 15, 1931*; that at the time of the discontinuance of business by said Union National Bank petitioner was the owner of stock thereof;

that on January 30, 1933, said Atlantic City National Bank, liquidating agent of said Union National Bank as aforesaid, was declared insolvent by the Comptroller of the Currency of the United States and placed in the hands of Laurence A. Slaughter, as Receiver, who, as Receiver of said Union National Bank, was the plaintiff in this suit; *that petitioner herein was adjudicated a bankrupt on April 21, 1933, and was discharged of all debts and claims on July 31, 1933*; that the stock of said Union National Bank referred to in the complaint filed in this suit was included in the schedule of assets filed in said bankruptcy proceeding and said Union National Bank was included in the list of creditors filed therein; that petitioner herein also listed in said schedules his liability for assessment on said bank stock; that said Atlantic City National Bank, liquidating agent of said Union National Bank, and its Receiver were included in the list of creditors filed in said bankruptcy proceedings; that *on December 13, 1933, said Union National Bank was declared insolvent by said Comptroller of the Currency* and said Slaughter was duly appointed Receiver thereof; that at the time of petitioner's adjudication as a bankrupt as aforesaid it had been determined that said Union National Bank was insolvent; that ever since September 30, 1931, said bank had continuously been closed to business and that its assets were insufficient in value to liquidate at a sum equal to the value placed upon them by said agreement of September 30, 1931; and that at the time of petitioner's adjudication as a bankrupt it had also been definitely determined and known that an assessment and requisition upon the shareholders of said Union National Bank to the total par value of the amount of stock outstanding would be necessary to pay the debts and claims of said bank. Also it was disclosed in said affidavit that the insolvency and necessity for assessment

on the stock of said Union National Bank was well known to said Slaughter, the plaintiff, at the time of petitioner's adjudication as a bankrupt and for a long time prior to his appointment as Receiver of said Union National Bank. (R. 38, par. 20.)

On January 8, 1934, the Comptroller of the Currency made the assessment upon the shareholders of the Union National Bank to the extent of the full par value thereof. Said assessment is the basis for this suit.

Respondent (plaintiff below) filed supplemental affidavit to be considered on said motion for summary judgment (R. 43 to 46, incl.), but nowhere therein was it denied that said Union National Bank was insolvent from a time prior to petitioner's adjudication as a bankrupt. In fact, the Receiver of said bank, in his affidavit, admits that before his appointment as Receiver of said Union National Bank, he knew of the insolvency of said bank and that an assessment would be made upon the stockholders thereof. (R. 45, line 23.)

In spite of the uncontradicted facts then appearing as aforesaid the United States District Court for the District of New Jersey struck out the answer filed and it was then determined and held that the obligation of petitioner, as the owner of said stock, did not arise out of contract, express or implied, but was in the nature of a statutory liability and that said obligation was not a provable debt or claim at the time of petitioner's adjudication and did not become so until the Comptroller made the assessment thereon. (R. 47 to 59, incl.) Summary judgment was accordingly entered on July 20, 1935, against petitioner herein. (R. 60.)

By order duly made on April 24, 1935, Edward J. O'Keefe, Receiver of said Union National Bank, appointed to succeed said Laurence A. Slaughter resigned, was sub-

stituted as party plaintiff in said suit (R. 46) and is the respondent herein.

An appeal from said judgment was taken by petitioner herein to the Circuit Court of Appeals for the Third Circuit. (R. 62 to 67, incl.) On January 24, 1936, said Circuit Court of Appeals filed its opinion reversing said judgment and holding that petitioner herein, having by force of law been deprived of all interest in, or ownership of, the stock, by reason of his adjudication in bankruptcy and the vesting of title thereto in his trustee, and ownership never having revested in petitioner, it was error to hold that petitioner was the owner when the stock was assessed. (R. 70 and 71.)

On January 24, 1936, an order was accordingly entered in said Circuit Court of Appeals reversing said judgment. (R. 72.)

Respondent herein thereafter filed petition with said Circuit Court of Appeals for rehearing alleging that in the findings of that Court the evidence in the case had been misapprehended, misconceived and overlooked. (R. 75.) In said petition for rehearing it was pointed out that the trustee in bankruptcy for petitioner herein had addressed a petition to the Referee in Bankruptcy praying authority to abandon all title to and disclaim all interest of the bankrupt in said stock and that by order of said Referee said petition was granted.

On March 18, 1936, said petition for rehearing was granted and "argument restricted to the question whether when the trustee disclaimed title to the bank stock which the law vested in him, he can reconfer title in the bankrupt without some affirmative action on the latter's part." (R. 81.)

On September 24, 1936, said Circuit Court of Appeals filed its opinion on rehearing by which it found that said trustee had declined to accept the stock so that the owner-

ship of said stock reverted to the bankrupt, the petitioner herein, and that the statutory liability of petitioner to assessment was not a provable claim for the reason that assessment had not been made thereon at the time of petitioner's adjudication as a bankrupt and so, consequently, was not discharged. Further, said Circuit Court of Appeals withdrew its opinion filed January 24, 1936, and substituted its opinion on rehearing therefor. (R. 82 to 84, incl.) Accordingly on September 24, 1936, an order was entered affirming said judgment. (R. 84.)

On the rehearing of said appeal the respondent contended that it was conceded below that the petitioner herein was the owner of the stock at the time the assessment was levied. There was no admission whereby it could be so contended. The third paragraph of the complaint filed in this case alleged that the petitioner herein was "the owner of ten (10) shares of the capital stock of the Union National Bank of Atlantic City, N. J." (R. 4). By the third paragraph of the answer filed, that allegation was denied. (R. 7.) The allegations of the "First Defense" (R. 6) set up in said answer, which it is alleged this petitioner consented to strike, were superfluous. Any consent to strike said "First Defense" did not dispose of the denial of ownership contained in the third paragraph of the answer.

III.

RULINGS OF THE COURT BELOW.

The District Court, in its opinion filed in this case said (R. 50), "While it may be that a creditor might have leave to prove a debt accruing after adjudication, under the circumstances in this case * * * I am satisfied that the

question involved is whether the amount due on the assessment was or was not a provable claim at the time of adjudication." Further that Court said (R. 50), "Under the early cases it is somewhat debatable as to whether the obligation is a contract or a claim based upon a statutory liability." It was held (R. 51) "quite clear that the one in whose name stock stands on the books of the association remains liable for assessment, so long as the stock is allowed to stand in his name." Said District Court recognized (R. 55) that "there are some cases, as against estates, devisees and legatees, in which it is held that the liability arises prior to the insolvency of the bank, and prior to the assessment by the Comptroller, for the purpose of charging the estates or beneficiaries with the payment of the assessment, but these decisions do not change the basic principle adopted in the McClaine case." The District Court conceived the basic principle of the McClaine case to be (R. 51) that the liability to stock assessment was a statutory liability, not a contract express or implied, and that the debt arising therefrom did not arise until the Comptroller had acted. The Court held (R. 56) that "if the Union National Bank was actually insolvent on September 30, 1931," the date when it went into voluntary liquidation, "the liability of the defendant could not be fixed on that date * * * and it was impossible to fix the defendant's liability until after the bank had been taken over by the Comptroller." Said District Court finally concluded (R. 56) "that the obligation of the defendant did not arise out of contract, express or implied, but was in the nature of a statutory liability, and that the debt arising therefrom became due and owing at the time the assessment was made. The liability of the shareholder, as to the debts of the national bank, is with relation to those debts owing at the time the assessment is made" and further

said (R. 58) "under the circumstances of the instant case, I am satisfied that the ownership of the stock was in the defendant at the time of assessment; that the obligation was not a provable claim against the bankrupt estate at the time of adjudication; that the discharge of defendant as a bankrupt did not relieve him from the assessment on his stock made thereafter; and that the fact that the Union National Bank went into voluntary liquidation prior to defendant's adjudication as a bankrupt could not fix the liability of defendant prior to adjudication, unless proceedings had been taken prior thereto under the provisions of 12 U. S. C. A. 65." Summary judgment was accordingly entered.

The Circuit Court of Appeals by its first opinion filed January 24, 1936 (R. 71), held, in part, that

> "on Brown's bankruptcy the ownership of this stock, by act of law, passed to his creditors and was vested in his trustee. Brown could not sell, control, assert or exercise any act of ownership over it. * * * It follows, therefore, that Brown, having by force of law been deprived of all interest in, or ownership of, the stock and ownership never having invested in him, the Court was in error in holding he was the owner when the stock was assessed. The judgment is, therefore, reversed."

After rehearing "restricted to the question whether when the trustee disclaimed title to the bank stock which the law vested in him, he can re-confer title in the bankrupt without some affirmative action on the latter's part" (R. 81), the Circuit Court of Appeals, disregarding petitioner's denial of ownership of said stock (Paragraph 3 of Answer, R. 6), disposed of the question previously decided by it by referring to the finding of the District Court that petitioner had consented to striking the first defense contained in his answer (R. 82) and then affirmed the judgment below

by adopting the opinion of the District Court holding "that the statutory liability of the defendant to future assessment was not a provable claim and consequently was not discharged." (R. 83.)

IV.

QUESTIONS PRESENTED.

1. Whether the liability of a stockholder of a national bank to assessment for the payment of the debts of the bank is a provable debt dischargeable in bankruptcy prior to the time when an assessment is actually levied thereon by the Comptroller of the Currency. So far this question has not been decided by this Court.

2. Whether the liability of a stockholder for the payment of the "contracts, debts and engagements" of a national bank (Act of Cong., Dec. 23, 1913, c. 6, §23, 38 Stat. 273; 12 U. S. C. A. §64) which is in the process of voluntary liquidation and closed to business under sections 5220 and 5221 of the National Banking Act (Act of Cong., June 3, 1864, c. 106, §42, 13 Stat. 112; R. S. §5220 and 5221; 12 U. S. C. A. §181 and 182) is a "debt," as defined in section 1, subdivision 11, of the Bankruptcy Act (Act of Cong., July 1, 1898, c. 541, §1, 30 Stat. 544; 11 U. S. C. A. sec. 1, subd. 11), provable within the purview of sections 63a and 63b (Act of Cong., July 1, 1898, c. 541, §63, 30 Stat. 562; 11 U. S. C. A. §103a and 103b) and dischargeable as provided for in section 17 (Act of Cong., July 1, 1898, c. 541, §17, 30 Stat. 550; 11 U. S. C. A. §35) though no assessment has been made on said stock by the Comptroller of the Currency (Act of Cong., June 30, 1876, c. 156, §1, 19 Stat. 63; R. S. 5151, Dec. 23, 1913, c. 6, §23,

38 Stat. 273), or by order of Court (Act of Cong., June 30, 1876, c. 156, §2, 19 Stat. 63; 12 U. S. C. A. §65) before the filing of the petition in bankruptcy and particularly when said bank is insolvent.

3. Whether the liability of a stockholder of a national bank for assessment for the payment of the debts of a bank is a "contract, express or implied," within the purview of section 63-a-4 of the Bankruptcy Act (Act of Cong., July 1, 1898, c. 541, §35, 30 Stat. 555; 11 U. S. C. A. §63).

4. Whether the liability of a stockholder of a national bank for the payment of the debts thereof becomes fixed at the time of the acquisition of said stock or at the time the assessment thereon is levied and that particularly with reference to a bank in voluntary liquidation.

5. If the liability of a stockholder of a national bank for assessment for the payment of the debts of the bank is a "contract, express or implied" but not "absolutely owing" at the time of the filing of a petition in bankruptcy, whether it is such a debt as is dischargeable within the purpose, intention and purview of sections 63a and 63b of the Bankruptcy Act.

6. If a stockholder in a national bank files a petition in bankruptcy listing his stock as an asset so that it thereby is transferred by operation of law to the trustee in bankruptcy more than 60 days in advance of an assessment made thereon to pay the debts of the bank and thereafter said trustee applies for and secures leave of the bankruptcy court "to abandon all title to and disclaim all interest of the bankrupt" therein but does nothing more, whether that act amounts to an abandonment by said trustee within

the purview of the law and the cases respecting disclaimer and abandonment of burdensome property so that the title to said stock reverts to the bankrupt with its attendant obligation for assessment without some act on the part of the bankrupt indicating his reassertion of title thereto.

V.

ARGUMENT.

In the case of *Local Loan Co. v. Hunt*, 292 U. S. 234, this Court reiterated the principle that an adjudication in bankruptcy releases a debtor from all previously incurred debts and that it cannot be supposed that the Act intended to keep such debts alive for the purpose of permitting the creation of an enforceable lien upon a subject not existent when the bankruptcy became effective or even arising from, or connected with, pre-existing property but brought into being solely as the fruit of the subsequent labor of the bankrupt. Also it was pointed out (at page 245) that the relief and new opportunity intended to be given the emancipated debtor

> "would be of little value to the wage earner if he were obliged to face the necessity of devoting the whole or a considerable portion of his earnings for an indefinite time in the future to the payment of indebtedness incurred prior to his bankruptcy."

The policy of the statute thus stated is likewise recognized in *Williams v. U. S. F. & G. Co.*, 236 U. S. 249; *Central Trust Co. v. Chicago Aud.*, 240 U. S. 582; and *Maynard v. Elliott*, 283 U. S. 273.

Point A.

The liability of a stockholder of a national bank to assessment for the payment of the debts of the bank is a "contract, express or implied" within the purview of Section 63-a-4 of the Bankruptcy Act.

As stated in the opinion below in the instant case (R. 49), "the statute (11 U. S. C. A., sec. 35), provides that the discharge 'shall release the bankrupt from all of his provable debts,' except such as are particularly scheduled therein." See Act of Cong., July 1, 1898, c. 541, §17, 30 Stat. 550; 11 U. S. C. A. §35.

Also the statute defines "debt" to mean "any debt, demand, or claim provable in bankruptcy." (Act of Cong., July 1, 1898, c. 541, §1, 30 Stat. 544; 11 U. S. C. A. §1.)

Section 63-a-4 of the said Act provides that debts of the bankrupt "may be proved and allowed against his estate which are • • • (4) founded upon an open account or upon a contract expressed or implied;" (Act of Cong., July 1, 1898, c. 541, §63, 30 Stat. 562; 11 U. S. C. A. §103-a-4).

Petitioner herein contends that liability for assessment on stock of a national bank must fall under the fourth classification of debts and subject to discharge as enumerated in section 63-a of the Bankruptcy Act, *supra.*

In *Williams v. U. S. F. & G. Co.*, 236 U. S. 549, 556, it was said:

> "Within the intendment of the law provable *debts include all liabilities* of the bankrupt founded on contract, express or implied, which, at the time of the bankruptcy, were *fixed in amount or susceptible of liquidation.*" (Italics ours.)

The Court below based its judgment in this case partly upon the finding that "the obligation of the defendant did

not arise out of contract, express or implied, but was in the nature of a statutory liability." (R. 56 and 83.) In so holding the Court pointed to the opinion of this Court in *McClaine v. Rankin*, 197 U. S. 154, as authority (R. 55 and 83). In this respect petitioner contends the Court below misconstrued the opinion in the McClaine case.

In numerous cases, many of which are in this Court, it has been held that the liability of stockholders of national banks is contractual. Notable among these are: *Hawthorne v. Calef*, 69 U. S. 10; *Flash v. Conn*, 109 U. S. 371; *Richmond v. Irons*, 121 U. S. 27; *Concord First Nat. Bank v. Hawkins*, 174 U. S. 364; *Mattson v. Dent*, 176 U. S. 521; *Whitman v. Oxford, &c.*, 176 U. S. 559; *McDonald v. Thompson*, 184 U. S. 71; *Christopher v. Norvell*, 201 U. S. 216; *Bernheimer v. Converse*, 206 U. S. 516; *Selig v. Hamilton*, 234 U. S. 652; *Coombs v. Getz*, 285 U. S. 434; *Broderick v. Rosner*, 294 U. S. 629; *Scott v. Latimer* (C. C. A. 8th), 89 Fed. 843; *DeWeese v. Smith* (C. C. A. 8th), 106 Fed. 438, affirmed in *Smith v. Brown*, 187 U. S. 637; *Williams v. Travis* (C. C. A. 5th), 277 Fed. 134; *Bromfield v. Mayer* (C. C. A. 8th), 29 Fed. (2d) 891; *Drain v. Stough* (C. C. A. 9th), 61 Fed. (2d) 668.

In the early case of *Hawthorne v. Calef*, 69 U. S. 10, it was held that the obligation of the stockholder was an agreement consequent upon and resulting from the acts and admissions or implied assent of the parties.

In *Concord First National Bank v. Hawkins*, 174 U. S. 364, it was said (p. 372):

> "Undoubtedly, the obligation is declared by the statute to attach to the ownership of the stock, and in that sense may be said to be statutory. But *as the ownership of the stock, in most cases arises from the voluntary act of the stockholder, he must be regarded as having agreed or contracted to be subject to the obligation.*" (Italics ours.)

In *Mattson v. Dent*, 176 U. S. 521, a widely quoted authority, this Court said (p. 525):

> "the obligation of a subscriber to stock • • • is contractual and arises from the subscription to the stock. • • • the obligation to respond is engendered by and relates to the contract from which it arises."

McDonald v. Thompson, 184 U. S. 71, was a suit by a receiver to recover an assessment made by the Comptroller and it was there held (p. 73):

> "Granting there was a contract with the creditors to pay a sum equal to the value of the stock taken, in addition to the sum invested in the shares, this was *a contract created by the statute*, and obligatory upon the stockholders by reason of the statute existing at the time of their subscription; • • • In none of the numerous cases upon the subject in this court is this obligation treated as an express contract, but as one created by the statute *and implied from the express contract of the stockholders to take and pay for shares* in the association." (Italics ours.)

Perhaps the most recent pronouncement of this Court is in the case of *Broderick v. Rosner*, 294 U. S. 629 (decided April 1, 1935), where, in an opinion by Mr. Justice Brandeis, it was said (p. 643):

> "The statutory liability sought to be enforced is contractual in character. The assessment is an incident of the incorporation."

It is true that in this latter case the Court had under consideration the liability imposed by sec. 120 of the Banking Law of the State of New York (Consol. Laws, Chap. 2) passed pursuant to Article 8, sec. 7, of the constitution of that State, but it is sufficient to note that the enactment

in that State is, in substance and effect, identical with the Federal provision respecting stockholders' liability.

In the case of *Seabury v. Green*, 294 U. S. 165, (decided February 4, 1935), this Court recognized the stockholders' liability as contractual for in that case it was held that minor children are not subject to stockholders' assessment because of the want of capacity to contract.

In relying upon *McClaine v. Rankin*, 197 U. S. 154, the Court below, in the instant case, pointed out that it was there said (at page 161) that the liability was "collateral and statutory." But in that case this Court conceded (at page 159) "that a statutory liability may be contractual in its nature, or more accurately, quasi-contractual." It is no authority for saying that the stockholder's liability is not dischargeable in bankruptcy as a "contract, express or implied."

The Court below in the instant case also said that the case of *Christopher v. Norvell*, 201 U. S. 216, "fully sustains the principle declared in the McClaine case" (R. 51). While it is true that the McClaine case is cited in *Christopher v. Norvell*, it is there held (at p. 228) that the stockholder's liability to assessment did not arise "*wholly* out of contract" but that it was "an implied obligation, • • • contractual in its nature."

In every case in which the stockholder's liability has been said to be "statutory" the question whether said liability was dischargeable in bankruptcy was not under consideration. In those cases the construction of State statutes was before the Courts as was pointed out in *Rogers v. Jarden* (D. C., E. D. Pa.), 3 Fed. Supp. 211.

The District Court, in this case, recognized this situation and said (R. 50):

> "Under the early cases it is somewhat debatable as to whether the obligation is a contract or a claim based

upon a statutory liability. *Under different circumstances the courts have come to different conclusions.*" (Italics ours.)

No case has been found in which it has even been suggested that the stockholder's liability is not dischargeable because not comprehended among those debts classified in Section 63-a of the Bankruptcy Act (Act of Cong., July 1, 1898, c. 541, §63, 30 Stat. 562; 11 U. S. C. A. §103). On the contrary, those cases in which said liability has been held dischargeable have classified it under subdivision 4 of that section referring to debts "founded • • • upon a contract express or implied." A stockholder's liability to assessment being dischargeable in bankruptcy it can only be as a "contract." The fact that such liability is dischargeable is, therefore, contradictory of the finding of the Court below in the instant case that said liability "did not arise out of contract, express or implied, but was in the nature of a statutory liability." (R. 56 and R. 83.)

Point B.

The liability of a stockholder for the payment of the "contracts, debts and engagements" of an insolvent national bank in the process of voluntary liquidation and closed to business is a "debt" provable within the purview of Sections 63-a and 63-b of the Bankruptcy Act, and therefore, is dischargeable though no assessment has been made on said stock before the filing of the petition in bankruptcy.

Any doubt whether a debt is provable, or whether it is an unliquidated demand which may be made provable, should be resolved in favor of its provability. *Maynard v.*

Elliott, 283 U. S. 273; *Local Loan Co. v. Hunt*, 292 U. S. 234.

1.

The stockholder's liability to assessment is comparable to that of a surety or guarantor.

The Court below, in its opinion (R. 50), says "I am unable to agree with the decided cases holding that a stockholder in a national bank becomes a surety as to his liability for assessment to pay the creditors of an insolvent institution."

In *Terry v. Tubman*, 92 U. S. 156, this court had before it a provision of the charter of a bank binding the individual property of its stockholders for the ultimate redemption of its bills in proportion to the number of shares held by them respectively and, as to that liability, it was said (p. 160),

> "The case is not so much like that of the guaranty of the 'collection' of a debt, where the previous proceeding against the principal debtor is implied, as *it is like a guaranty of 'payment,'* where a resort may be had at once to the guarantor without a previous proceeding against the principal." (Italics ours.)

In the case of *Coombs v. Getz*, 285 U. S. 434, 76 L. Ed. 866, this Court was called upon to construe a provision of the California Constitution very similar to the statute prescribing the liability of stockholders in national banks. In that case it was said (at page 448) the obligation was "a contractual liability in the nature of a suretyship."

In *Williams v. Travis*, (C. C. A. 5th) 277 Fed. 134, 137, it was said,

> "Under the statute the *liability of one who is a stockholder of a national bank* at the time of its failure *is*,

to the extent of the par value of his stock in addition to the amount invested therein, *the same as it would have been if, by express contract and to the same extent, he had become the bank's surety* for all its contracts, debts and engagements." (Italics ours.)

In *King v. Pomeroy,* (C. C. A. 8th) 121 Fed. 287, the Court spoke of the stockholders as "the guarantors of its" (the corporation's) "obligations" and said that the stockholder's liability "was the pledge of a trust fund for the benefit of creditors."

2.

Claims founded upon contract are provable though not due and owing when the petition in bankruptcy is filed.

In the court below respondent urged that the petitioner's liability "was not fixed and absolutely owing at the time defendant filed his petition and his liability, if any, was at that time purely contingent," and that said liability does not become "due or enforceable before the Comptroller decides that it is necessary to collect it and fixes the date for its payment." The Court below apparently agreed with this view and said (R. 35), "I am convinced that • • • the debt arising therefrom became due and owing at the time the assessment was made. The liability of the shareholder, as to the debts of the national bank, is with relation to those debts owing at the time the assessment is made." This is, in effect, saying that the debt is not dischargeable unless due and owing at the time of the bankrupt's adjudication and discharge. In this respect the Court below fell into error.

The "debt" (stockholder's assessment), being founded on implied contract, need not be due and owing to be the

subject of a discharge in bankruptcy. That was the decision of this Court in the case of *Maynard v. Elliott*, 283 U. S. 273, 275. Mr. Justice Stone, speaking for the Court, said:

> "Although the omission of any reference to contingent claims in Sec. 63 of the present act has led to some confusion and uncertainty in the decisions, *it is now settled that claims founded upon contract*, which at the time of the bankruptcy are fixed in amount or susceptible of liquidation, *may be proved under subdivision* (a) (4) *of that section, although not absolutely owing when the petition is filed.*
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> • • • • • • • • •
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> "That section purports to be an enumeration of classes of provable claims—not an enumeration of characteristics which must inhere in every claim proved. Only by reading into subdivision (a) (4) the limitation of subdivision (a) (1) that the claim must be absolutely owing, would there be ground for rejecting a claim against a bankrupt endorser as not complying with the former.
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> "Respondent argues that (a) (4) must be so read, since, otherwise, the limitation in (a) (1) would be practically without effect. • • • But this contention was rejected by the decision in Williams v. United States Fidelity & G. Co. • • • and is not supported, as respondent contends, by Zavelo v. Reeves.
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> "Possible doubts as to the meaning of the section should be resolved in the light of the purpose of the act 'to convert the assets of the bankrupt into cash for distribution among creditors and then to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.' • • • If this purpose be given its appropriate weight, a meaning cannot be attributed to the plain words of subdivision (a) (4) which would so restrict them as to preclude proof of claim upon

> the liability of an endorser of commercial paper, and result in its survival of the bankrupt's discharge as an obligation enforceable against him."

This principle of law was recognized by the Circuit Court of Appeals for the Third Circuit (from which Court this appeal is taken) in the case of *Moch v. Market St. Nat. Bank*, 107 Fed. 897, where it was said (at page 898),

> "The first and fourth subdivisions of Section 63 are distinct provisions and are, we think, independent of each other. We are unable to agree to the proposition that subdivision 1 qualifies, and is to be carried down and read into, subdivision 4."

In this same connection also see—*Manhattan Properties, Inc. v. Irving Trust Co.* (C. C. A. 2d), 66 Fed. (2d) 470, affirmed 291 U. S. 320, 78 L. Ed. 824; *In re Metropolitan Chain Stores, Inc.*, (C. C. A. 2d), 66 Fed. (2d) 485; *Wright v. Irving Trust Co.*, (C. C. A. 2d), 70 Fed. (2d) 245; *In re United Cigar Stores Co.*, (C. C. A. 2d), 70 Fed. (2d) 263; *Grant Shoe Co. v. Laird Co.*, 212 U. S. 445.

There is quite a distinction between saying that the stockholder's liability is a debt or claim and saying that it is due and enforceable. The cases on which respondent relied in the court below were *Kennedy v. Gibson*, 75 U. S. 498; *McDonald v. Thompson*, 184 U. S. 71; *Rankin v. Barton*, 199 U. S. 228; *Casey v. Galli*, 94 U. S. 673; *National Bank v. Case*, 99 U. S. 628; *U. S. v. Knox*, 102 U. S. 422; *Bushnell v. Leland*, 164 U. S. 684; *McClaine v. Rankin*, 197 U. S. 154; *Forrest v. Jack*, 294 U. S. 158; *Aldrich v. Skinner*, 98 Fed. 375; and *Armstrong v. McAdams*, 46 Fed. (2d) 931. The particular question involved in all of these cases was with reference to the time when the statute of limitations commenced to run against the action to recover the stock assessment. For that purpose the several Courts

decided and agree that *the right of action* did not accrue until the assessment had been made by the Comptroller. Those cases cannot, under any stretch of the imagination, be said to be authority for the proposition that the stockholder's liability to assessment is not provable and so not dischargeable until the assessment is made by the Comptroller even in a case of involuntary liquidation. There is a distinction between "a debt" and the accrual of the right of action thereon.

In all of the following cases debts or claims against bankrupts were found to be provable and therefore discharged notwithstanding that the debts or claims were immature at the time of filing petitions. *Glenn v. Abell,* (C. C., D. S. C.) 39 Fed. 10; *In re Joel J. Gerson,* 107 Fed. 897; *Cobb v. Overman,* (C. C. A. 4th) 109 Fed. 65; *In re Frederick L. Grant Shoe Co.,* (C. C. A. 2d) 130 Fed. 881 affirming 125 Fed. 576; *In re Pettingill & Co.,* (D. C., Mass.) 137 Fed. 143; *In re Smith,* (D. C., R. I.) 146 Fed. 923; *In re James Dunlap Carpet Co.,* (D. C., Pa.) 163 Fed. 541; *In re Caloris Mfg. Co.,* (D. C., E. D. Pa.) 179 Fed. 722; *In re Glick,* (D. C., N. Y.) 184 Fed. 967; *Hardesty v. Young,* (D. C., Minn.) 34 Fed. (2d) 310; *In re William H. Morgan,* (D. C., N. J.) 39 Fed. (2d) 489; *Delong v. Mechanics & Metals Nat. Bank,* 153 N. Y. S. 1010; *City Hall B. & L. Assn. v. Star Corp.,* 110 N. J. Law 570.

It has been held in a number of cases that a claim based on a contract right, although for unliquidated damages, is provable in bankruptcy. *Crawford v. Burke,* 195 U. S. 176; *Tindle v. Birkett,* 205 U. S. 184; *Re Manhattan Ice Co.,* (D. C. N. Y.) 114 Fed. 400 affirmed as *In re Stern* (C. C. A. 2d) 116 Fed. 604; *Merchants' Natl. Bank v. Cont. B. & L. Assn.,* (C. C. A. 9th) 232 Fed. 828; *Matter of Spengler,* (D. C. Iowa) 238 Fed. 862; *Carroll Elec. Co., v. Snelling,* (C. C. A. 1st) 62 Fed. (2d) 413.

In *Central Trust Co. v. Chicago Auditorium*, 240 U. S. 582, this Court held that a claim for damages by reason of a breach of an executory contract was provable within the meaning of Sec. 63-a-4 and that the damages might be liquidated under Sec. 63-b.

3.

Assuming, but not admitting, that the liability of petitioner in this case was contingent at the time of the filing of his bankruptcy petition it, nevertheless, was provable.

In *Manhattan Properties, Inc., v. Irving Trust Co.*, (C. C. A. 2d) 66 Fed. (2d) 470, affirmed 291 U. S. 320, it was held that a contingent claim may in general be proved. Also see *In re Metropolitan Chain Stores, Inc.*, (C. C. A. 2d) 66 Fed. (2d) 485; *Wright v. Irving Trust Co.*, (C. C. A. 2d) 70 Fed. (2d) 245; *In re United Cigar Stores Co.*, (C. C. A. 2d) 70 Fed. (2d) 263; *In re F. & W. Grand Stores, Inc.*, (C. C. A. 2d) 74 Fed. (2d) 654; *In re Paramount Publix Corp.*, (D. C., S. D. N. Y.) 8 Fed. Supp. 644; *In re Smith*, (D. C., R. I.) 146 Fed. 923; *In re James Dunlap Carpet Co.*, (D. C. Pa.) 163 Fed. 541; and *In re Pettingill & Co.*, (D. C. Mass.) 137 Fed. 143.

In *Collier on Bankruptcy*, Thirteenth Edition, Vol. 2, at page 1421, it is said:

> "The test as to whether a claim is really contingent or simply one unliquidated by legal proceedings is this: Have all the facts necessary to be proved to fasten liability already occurred? If so the claim is not contingent."

In *Maynard v. Elliott*, 283 U. S. 273, 75 L. Ed. 1028, it was held that where the amount is certain and the con-

tingency is within the control of the creditor so far as its certainty of accrual and its susceptibility of liquidation are concerned, the debt was discharged, although the creditor had done nothing at the time of the bankruptcy to satisfy the liability.

In the instant case the amount was certain for petitioner's liability was fixed and limited to the extent of the par value of his stock. It was within the power and the contingency, if any, was within the control of the respondent so far as its certainty of accrual and its susceptibility of liquidation were concerned. The Union National Bank being in the process of voluntary liquidation the stockholder's liability was enforceable by virtue of Act of Cong., July 1, 1898, c. 541, §63, 30 Stat. 562; 11 U. S. C. A., Sec. 103-b, and Act of Cong., June 30, 1876, c. 156, §2, 19 Stat. 63; 12 U. S. C. A., §65. All the facts necessary to be proved to fix the stockholder's liability in this case had occurred and were known to this respondent, who was Receiver for the Atlantic City National Bank, the principal creditor of the defunct Union National Bank, and such was the status of affairs at the time this petitioner filed his petition in bankruptcy.

In *Wolf v. Stix*, 99 U. S. 1, Mr. Chief Justice Waite, in discussing the question of the liability arising under a replevin bond in an attachment proceeding to answer the judgment of the Court for the value of the goods replevied, and whether such liability constituted a contingent debt provable in bankruptcy, said (at pages 7 and 8):

> "The debt thus created was provable under the bankruptcy act. It was payable upon the happening of an event which might never occur, and was, therefore, contingent. The bond was in full force when the petition in bankruptcy was filed. The sum to be paid was certain in amount. Whether the event will ever occur, the amount to be paid was fixed."

This principle is also recognized and approved in the following cases: *Irons v. Mfgrs., etc.* (C. C., N. D. Ill.), 17 Fed. 308; *Glenn v. Dorsheimer* (C. C., E. D. Mo.), 23 Fed. 695; *Murray v. Sill* (C. C. A. 9th), 7 Fed. (2d) 589; *Hendrickson v. Helmer,* 7 Fed. Supp. 627.

It has also been held that the liability of the shareholders under Section 64 attaches when the "contracts, debts and engagements" of the bank are entered into. *Foster v. Lincoln* (C. C., D. Vt.), 74 Fed. 382, affirmed (C. C. A. 2d), 79 Fed. 170; *Witters v. Sowles* (C. C., D. Vt.), 32 Fed. 130, 137; *Young v. Wenepe* (C. C., N. D. Cal.), 46 Fed. 354; *DeWeese v. Smith* (C. C. A. 8th), 106 Fed. 438, affirmed *Smith v. Brown,* 187 U. S. 637.

In *Terry v. Tubman,* 92 U. S. 156, 165, Mr. Justice Hunt, speaking for this Court, said:

> "the liability of the stockholders arises when the bank refuses or ceases to redeem and is notoriously and continuously insolvent."

The case last cited above was referred to with approval in *Terry v. Anderson,* 95 U. S. 628.

In *Carey v. Mayer* (C. C. A. 2nd), 79 Fed. 926, 929, the Court said:

> "when the fact of insolvency has been confessed, and an assignment for the benefit of its creditors has been made, nothing remains to be done, in order to make the liability a fixed debt, but to ascertain the amount of the assessment by the intervention either of the corporation or of a court of chancery."

There are many cases which seem to refute the findings of the Court below that petitioner's liability as a stockholder of the Union National Bank did not become fixed, and, therefore, provable until the Comptroller's assessment was made thereon. The insolvency and voluntary liquida-

tion of the Union National Bank preceded the Comptroller's assessment by more than two years.

The respondent argued in the court below that it must be the law that "in cases where a national bank is in voluntary liquidation, under provisions of 12 U. S. C. A., 181" (Act of Cong., June 3, 1864, c. 106, §42, 13 Stat. 112), "there must be some judicial ascertainment of the necessity for levying an assessment against the shareholders before their liability to such an assessment attaches and becomes absolute," etc. The only two sections of the National Banking Act which refer to the enforcement of the stockholders' liability are Act of Cong., June 30, 1876, c. 156, §2, 19 Stat. 63, and Act of Cong., May 15, 1916, c. 121, 30 Stat. 121. The first of said Acts provides that when any national bank shall have gone into voluntary liquidation, the individual liability of the shareholders "may be enforced by any creditor of such association by bill in equity," etc., and the other provides that where a national bank has been declared insolvent by the Comptroller of the Currency, the Receiver appointed by him under the authority of that section "may, if necessary, to pay the debts of such association, enforce the liability of the stockholders," but that such action may be taken only "under the direction of the Comptroller." It can plainly be seen, therefore, why our Courts have said that the Receiver can only act after the Comptroller has determined the necessity for such action and why it has been decided that the Comptroller must determine that necessity before the Receiver proceeds to enforce the liability. It is quite clear that Congress intended that creditors should have the right to enforce the liability by creditors' bill without any prior determination of the necessity therefor. Our Courts have in a number of instances recognized this distinction between the two sections of the National Bank-

ing Act herein referred to. Some of those cases will be referred to later herein.

The District Court below, in this case, held that the obligation was not a provable debt because it was impossible to fix liability until after the bank had been taken over by the Comptroller (R. 56). It relied upon *Scovill v. Thayer*, 105 U. S. 143 (R. 56), and *Hawkins v. Glenn*, 131 U. S. 319 (R. 58). The Circuit Court of Appeals adopted this view (R. 83). The cases cited by the Court below involved the recovery of an assessment due on account of a subscription to stock, not fully paid for, and the question of the time when the statute of limitations commenced to run against such action. Said cases had no reference to an assessment made by the Comptroller under the authority of the National Banking Act.

Since the filing of the petition for certiorari in this cause there has come to the attention of petitioner the case of *Erickson v. Richardson*, decided on December 9, 1936, in the Circuit Court of Appeals for the Ninth Circuit. The opinion does not appear in the official reports. It was published in the January 22, 1937, issue of New Decisions of the Bankruptcy Law Service of Commercial Clearing House, Inc., and is designated therein as No. 4371. The opinion is here quoted in full:

> "Prior to January 21, 1935, appellee, as superintendent of banks of the State of California, took possession and charge of the assets of the Bank of San Pedro. At that time bankrupt owned 2,602 shares of the common capital stock of said bank which had a par value of $100 per share. On January 21, 1936, the bankrupt was adjudicated bankrupt. The referee allowed as a general claim against the bankrupt estate, the claim for $260,200 presented by appellee.
>
> "Appellant, the trustee in bankruptcy, contends that the claim could not be filed in the bankruptcy

proceeding because: (1) the assessment *made after the filing of the petition* was too indefinite and remote a contingency to constitute a debt at the time of the filing of the petition; and (2) if it were such a debt, it is 'founded' *entirely* upon the California statute imposing double liability, and has none of the elements which would constitute a debt 'founded • • • upon a contract express or implied,' as required by sec. 63 (a) (4) of the Bankruptcy Act. It is conceded that the liability here sought to be enforced is not within any other provision of Sec. 63.

"With regard to the first contention, it seems foreclosed by the decision in Maynard v. Elliott, 283 U. S. 273, in which the Supreme Court held that the future and contingent liability of an indorser of commercial paper, executed before but maturing after the filing of the petition in bankruptcy, is a debt on an express contract, provable in a bankruptcy proceeding. The contingencies of liability upon the assessment of the stock by the superintendent of banks are no more remote, uncertain, or unlikely, than the non-payment of commercial paper or the non-performance of a guaranteed obligation.

"With regard to the second contention, the court holds that the obligation of the stockholder to the insolvent bank to pay the moneys to discharge the bank's creditors is a debt 'founded upon a contract' as that term is used in the bankruptcy statute. The character of a stockholder's liability must be determined by the California law, and under California law it is held that such liability arises out of contract. The claim was therefore properly allowed."

Petitioner has been unable to find any case deciding that the stockholder's liability is not dischargeable in bankruptcy until after the Comptroller has levied the assessment. Assume, by way of illustration, that the Comptroller of the Currency determines that a national bank is insolvent and appoints a receiver in charge; that

one year thereafter the Comptroller levies a stock assessment; and that during the interim between the appointing of a receiver of the insolvent bank and the levying of the assessment, a stockholder of that institution is adjudged a bankrupt and discharged of his debts, among which was listed his stock liability. Can it be said that under such circumstances the stockholder is not legally discharged of that obligation? All of the elements are present to make that liability in that instance a provable debt, except, of course, that it is not due and owing, and as was said in *Maynard v. Elliott*, 283 U. S. 273, that limitation cannot be read into Section 63-a-4 of the Bankruptcy Act. The illustration stated above is analogous to the situation in the instant case. Here the Union National Bank went into liquidation in September, 1931, at which time it was insolvent. Petitioner was discharged in bankruptcy in July, 1933. The Comptroller declared the bank insolvent and appointed a Receiver in December, 1933. There was, therefore, not one single element lacking to make this petitioner's liability to assessment a provable debt. The necessity for assessment was certain and could have been definitely enforced by creditors' bill. Judicial ascertainment of the necessity was not essential to a fixing of the liability; it could only serve to determine the amount due.

In reliance upon the great weight of authority, it is respectfully submitted that the liability as a stockholder of the Union National Bank became fixed and susceptible of liquidation at least at the time of the occurrence of insolvency of that bank which was before the time of the filing of petitioner's petition in bankruptcy.

4.

Petitioner's liability to assessment was capable of liquidation and enforcement.

The Union National Bank closed for business on September 30, 1931, and transferred all its assets to The Atlantic City National Bank for liquidation. On December 15, 1931, that action was approved by the stockholders of the Union National Bank in formal meeting and it was further decided at said meeting to liquidate said Union National Bank in accordance with the provisions of Sections 5220 and 5221 of the National Banking Act. (Act of Cong., June 3, 1864, c. 106, §42, 13 Stat. 112; 12 U. S. C. A. §181 and 182.)

Section 2 of the Act of June 30, 1876, c. 156, 19 Stat. 63 (Title 12, U. S. C. A., §65), reads as follows:

> "*When any national banking association shall have gone into liquidation under the provisions of section five thousand two hundred and twenty of said statutes*" (Act of Cong., June 3, 1864, c. 106, §42, 13 Stat. 112; 12 U. S. C. A., §181), "*the individual liability of the shareholders provided for by section fifty-one hundred and fifty-one of said statutes*" (Act of Cong., Dec. 23, 1913, c. 6, §23, 38 Stat., 273; 12 U. S. C. A., §64), "*may be enforced by any creditor of such association*, by bill in equity in the nature of a creditor's bill, brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established."

In the case of *Wyman v. Wallace*, 201 U. S. 230, a proceeding by a creditor to fix the stockholders' liability was approved.

In the case of *Hightower v. American Nat. Bank of Macon*, 263 U. S. 351, affirming (C. C. A., Ga., 1921), 276 Fed. 371, the facts were quite analogous to the instant case. In that case an agreement under which one national bank took over the assets of another for the purpose of liquidation and assumed the latter's liabilities was held to constitute a loan with the assets pledged as security, and not a purchase of the assets by the bank receiving them, and consequently, it was a creditor, entitled to enforce the liability of the shareholders of the liquidating bank, under Sections 5151, 5220 and 5221 of said National Banking Act. It was also held in that case that the claim of the second bank for money advanced in excess of the assets was not created during the liquidation but was a debt arising under the contract.

In *George v. Wallace* (C. C. A. 8th), 135 Fed. 286, it was held that where a national bank assumes the debts of an insolvent bank contemplating liquidation, in consideration of a transfer of certain of the bank's available assets, and certain notes for the balance, such notes represented the "contracts, debts, and engagements" of the insolvent bank in equity, for which its shareholders were liable.

In the case of *Irons v. Manufacturer's National Bank* (C. C., N. D. Ill.), 17 Fed. 308, the original bill was filed by a judgment creditor against the defendant bank in February, 1875. It charged that the bank had suspended payment and gone into liquidation by a vote of its stockholders; that the Comptroller of the Currency had refused to appoint a receiver; that it had equitable assets which were not subject to execution and that such assets were being misapplied by its officers. The bill asked for the appointment of a receiver to take possession of the assets and wind up the affairs of the bank. By subsequent amendment to the bill, filed October 5, 1876, it was asked that

the stockholders of the bank be charged with their stock liability as created by the National Banking Act to the extent that may be necessary within the par value limit of the stock for the purpose of paying the bank's debts. Certain of the stockholder defendants advanced their discharges in bankruptcy as a defense against the liability to pay the assessment, and in this connection the Court held that it was certainly competent, under Section 5068 of the Revised Statutes (then in force), for the receiver to have proved the claim in the bankruptcy proceedings. The Court said (at p. 314) that "two factors for estimating the extent of the stockholder's liability, and debts and assets, were as well known then as now" and that even if this was not so "the court of bankruptcy would undoubtedly have given time, and so far delayed the proceedings as to enable such an estimate to be made before closing the affairs of the bankrupt estate and ordering a final dividend." The Court also said, in this case (at p. 314), that from the time the defendants became stockholders,

> "they stood liable for the debts of the bank to the extent of the stock held by them, if it should become necessary to resort to such liability after exhausting the assets of the bank, and therefore the receiver stood in a position, at the time these bankruptcy proceedings were pending, to have proved these claims before the bankruptcy court."

This same case (*Irons v. Manufacturer's National Bank*) was again before the Court in 1886 (27 Fed. 591). At that time, after considering and discussing the effect of *Garrett v. American File Co.*, 110 U. S. 288, upon its previous decision and concluding that it did not warrant any change therein, the Court held the stockholders' liability had become fixed, the debts of the bank were a fixed quantity, the amount of stock which the shareholders

respectively owned was easily provable and the claims for individual liability could have been proven.

The opinion in the Irons case might well have been written and applied to the instant case for the procedure there outlined could have been adopted and followed here.

Section 5068 of the Revised Statutes, Title "Bankruptcy," which is quoted and applied in the Irons case, is no longer law. Section 63-b of the Bankruptcy Act takes its place. The comparative effects of these two statutory enactments are discussed at quite some length in Volume II of Collier on Bankruptcy, Thirteenth Edition, page 1418, under the title "Unliquidated Claims." Also in a note appended to page 1420 of the same volume there is a discussion of the effects of these two statutes.

Upon reading the discussions of these authorities, as well as the opinions in the cases herein cited, it will be noted that in so far as the facts of this case are concerned, there is no real distinction between the two statutes. Whereas under Section 5068 of the Revised Statutes respecting "Contingent Liabilities," a liability which had become fixed but was undetermined in amount was provable, so now under Section 63-b liabilities which have become fixed are likewise provable as to the extent of said liability.

In *Central Trust Co. v. Chicago Auditorium*, 240 U. S. 582, it was determined that a claim for damages by reason of the breach of an executory contract might be liquidated under Section 63-b.

In *Dunbar v. Dunbar*, 190 U. S. 340, the Court said (p. 350), that the purpose of Section 63-b

> "is to permit an unliquidated claim, coming within the provisions of section 63-a, to be liquidated as the court should direct."

In *Schall v. Camors,* 251 U. S. 240, it was said (p. 249):

> "That clause b provides the procedure for liquidating claims provable under clause a if not already liquidated, especially those founded upon an open account or a contract, express or implied, is entirely clear, and has been recognized repeatedly in our decisions." • • •

(p. 251):

> "Since claims founded upon an open account or upon a contract express or implied often require to be liquidated, some provision for procedure evidently was called for; clause b fulfills this function," &c.

See also *Maynard v. Elliott,* 283 U. S. 273, and *Merchants Natl. Bank v. Cont. B. & L. Assn.* (C. C. A. 9th), 232 Fed. 828.

In the case of *In re Mertens & Co.* (C. C. A. 2d), 147 Fed. 177, the Court said:

> "We think that section 63-b must be interpreted in the light of the other sections of the law and that to construe it as meaning that no proof of unliquidated claims can be filed until the precise amount due thereon is established will, in practical operation, make the allowance of such claims impossible, for the reason that a hostile trustee or creditor can easily delay the liquidation until after the expiration of the year."

In this latter case it was held that a clear statement of claim in writing duly verified and filed was sufficient and that it might be liquidated afterwards.

As to the method of fixing the shareholder's liability it was said in *U. S. v. Knox,* 102 U. S. 422, 425:

"In the process to be pursued to fix the amount of the separate liability of each of the shareholders, it is necessary to ascertain (1) the whole amount of the par value of all the stock held by all the shareholders; (2) the amount of the deficit to be paid after exhausting all the assets of the bank; (3) then to apply, the rule that each shareholder shall contribute such sum as will bear the same proportion to the whole amount of the deficit as his stock bears to the whole amount of the capital stock of the bank, at its par value. There is a limitation of this liability. It cannot in the aggregate exceed the entire amount of the par value of all the stock."

It has been held by the Courts that the bankruptcy law calls upon the creditor to act and that he cannot preserve a right by postponing action. *Williams v. U. S. F. & G. Co.*, 236 U. S. 249; *Irons v. Mfgrs. Natl. Bank* (C. C., N. D. Ill.), 17 Fed. 308.

If it be urged that, in this case, there was no creditor with a definite and determined claim who could apply to have the petitioner's stock liability fixed then that point may be answered by reference to the case of *George v. Wallace*, 135 Fed. 286, 292 (C. C. A. 8th), affirmed *Wyman v. same*, 201 U. S. 230, and *Frenza v. same*, 201 U. S. 244, and *Poppleton v. same*, 201 U. S. 245. In that case it was held that in order to maintain a bill to determine the liability of stockholders of a bank in voluntary liquidation it was not essential that the complainant should have first reduced his demand to judgment. The Court said, at page 293:

"In this connection it may be observed that while in section 1 of the Act of 1876, it is expressly provided that a creditor who is entitled to call upon the Comptroller of the Currency to institute involuntary proceedings against a national bank must have reduced his demand to judgment, by section 2 'any creditor' may

file a bill against the shareholders of a bank in voluntary liquidation."

Respondent urged in the court below that Section 2 of the Act authorizing the appointment of receivers of national banks (Act of Cong., June 30, 1876, c. 156, §2, 19 Stat. 63; 12 U. S. C. A. §65) applied only to solvent banks and so therefore could not apply here. The case of *City National Bank of Huron v. Fuller* (C. C. A. 8th), 52 Fed. (2d) 870, was cited as authority on that point. However, in *Southwest National Bank v. Farracy* (D. C., N. D. Tex.), 50 Fed. (2d) 959, it was held that said provision "may be advantaged by either a solvent or insolvent institution." This latter statement is sound law. Were it not so, then why did Congress provide that in cases of voluntary liquidation a creditor might resort to appropriate legal action to enforce the stockholder's liability? If the bank in voluntary liquidation is not insolvent then there can be no stockholder's liability, and so, *a fortiori*, no suit to enforce that liability would be necessary. Further proof that said provision applies to insolvent banks is the fact that in many cases where this provision has been resorted to and held to apply the banks in liquidation were insolvent. Some such cases are: *Cent. Nat. Bk. v. Conn. Mut. Life Ins. Co.*, 104 U. S. 54; *Richmond v. Irons*, 121 U. S. 27; *Schrader v. Mfgrs. Nat. Bk.*, 133 U. S. 67; *Commercial Nat. Bk. v. Weinhard*, 192 U. S. 243; *Hightower v. Am. Nat. Bk.*, 263 U. S. 351; *Williamson v. Bank* (C. C. A. 5th), 115 Fed. 793, affirming (C. C., D. S. C.) 109 Fed. 36; *King v. Pomeroy* (C. C. A. 8th), 121 Fed. 287; *George v. Wallace* (C. C. A. 8th), 135 Fed. 286, affirmed in *Wyman v. same*, 201 U. S. 230, and *Frenza v. same*, 201 U. S. 244, and *Poppleton v. same*, 201 U. S. 245; *Standard Trust Co. v. Coml. Natl. Bank* (C. C. A. 4th), 240 Fed. 303; *First Nat. Bk. v. Harris* (C. C. A. 8th), 27 Fed. (2d) 117; *Derschield v. Andrew* (C. C. A. 8th), 34 Fed. (2d) 884.

In *Williams v. Travis* (C. C. A. 5th), 277 Fed. 134, 137, it was said:

> "The statute providing for the enforcement of stockholders' individual liability on voluntary dissolution of a national bank by bill in equity, in the nature of a creditors' bill, brought in behalf of all creditors of the bank (19 Stat. 63), is a recognition of the existence of the relation of debtor and creditor between a liquidating bank's stockholders and its creditors. That relation exists between the stockholders of a failed bank and its creditors before the accrual of a right of action to enforce the payment of the ascertained amount required by law."

5.

In considering the time when the stockholder's liability becomes fixed or due and owing a distinction must be made between national banks in liquidation and those for which a receiver has been appointed.

In the opinion of the District Court (R. 56) adopted by the Circuit Court of Appeals as its opinion (R. 83), it is said that "the statute found in 12 U. S. C. A. 65, providing for the fixing of the liability by the Court, as to banks in liquidation, could not advance the time of the defendants' liability, unless court proceedings had been taken thereunder." The cases of *Scovill v. Thayer*, 105 U. S. 143, and *Hawkins v. Glenn*, 131 U. S. 319, 33 L. Ed. 184, were cited as support for that view. In this respect, it is respectfully submitted that the lower Court was in error. In the first place, 12 U. S. C. A. 65 (Act of Cong., June 30, 1876, c. 156, §2 19 Stat. 63), does not provide for the "fixing" of the liability. That section provides that the individual liability of the shareholders "may be enforced" by any

creditor. There is a decided difference between "fixing" and "enforcing" said liability. Secondly, a distinction was recognized by this Court in the case of *McDonald v. Thompson*, 184 U. S. 71, between actions brought by creditors under Section 5220 of the National Banking Act (providing for voluntary liquidation) and those brought by a receiver under Section 5234 (authorizing the Comptroller to step in, in the event of insolvency), to recover stockholder's assessment and in this connection Mr. Justice Brown, speaking for the Court, said (at p. 76):

> "But it is also sufficient to say of this that the action is not brought by the creditors under the second section of the Act of June 30, 1876, but by the receiver under Rev. Sta. Sec. 5234. In such cases no debt becomes due to the receiver as such until a deficiency has been ascertained and an assessment made, when the statute begins to run. Scovill v. Thayer, 105 U. S. 145; Hawkins v. Glenn, 131 U. S. 319."

Point C.

When a trustee disclaims title to burdensome property vested in him by operation of law, he cannot reconfer title in the bankrupt together with its attendant burdens or obligations without some affirmative action on the latter's part.

By the adjudication in bankruptcy and the appointment of the trustee, the bankrupt in this case was divested of all title to his property, and that title vested in the trustee as of the date of filing the petition in bankruptcy. Certainly there can be no doubt that such is the law.

It is likewise the law that the trustee may abandon any of the property of the bankrupt that he deems burdensome

and worthless for the purposes of the bankrupt estate. It was argued below that the title to such abandoned property remains in or reverts to the bankrupt upon the exercise of the trustee's right of abandonment, and from this it is asserted in effect, that the obligations which attached to the abandoned property likewise remain in or revert to the bankrupt and are not discharged in the bankruptcy proceedings.

It is true that the courts have on many occasions said that the title to abandoned property revests in the bankrupt. However, there is no justification for the assertion that an abandonment of the property amounts to a reinstatement of the obligations affixed thereto.

As to encumbered property abandoned by the trustee, the Court *In re Webb*, 54 Federal (2d) 1065, 1067 (C. C. A. 4th), said that "The property and the right of redemption remains in or reverts to the bankrupt." There is, however, no law that has come to petitioner's attention by which it can be said that the bankrupt by reason of the abandonment is compelled to assert his right or title thereto. While there seems to be no direct statement of law on that specific question, there is, nevertheless, an answer to be found by inference in statements made in several of the cases. In *First National Bank of Jacksboro v. Lasater*, 196 U. S. 115, the Court, speaking of trustees in bankruptcy, said (at p. 119), "If they decline to take the property, the bankrupt *can assert* title thereto." This statement of this Court seems to indicate that it is for the bankrupt to elect to assert or claim the title to the abandoned property.

In *re Wattley*, 62 Fed. (2d) 828, 829 (C. C. A. 2d), the Court said: "When property is abandoned, the bankrupt *may reassert* whatever title he had before bankruptcy."

In the case of *In re Webb*, 54 Fed. (2d) 1065, 1067 (C. C. A. 4th), the Court, in speaking of the title to abandoned

property said, "The bankrupt *has a right to assert* his title thereto."

In all of the above cited authorities, it is certainly apparent that the Court regarded as necessary some overt act on the part of the bankrupt before he could be said to have accepted the return of the title of the property so abandoned. No Court has yet said that after having been adjudicated a bankrupt and the bankrupt having been discharged from the burden of the obligations attached to his property, that same burdensome and onerous property which in all probability compelled his bankruptcy, can be thrown back upon him with all its burdens by the mere act of abandonment by trustee.

The trustee is the representative of the creditors. In fact, he is chosen by them. His status and duties are fully outlined in the case of *Imperial Assurance Company v. Livingstone,* 49 Fed. (2d) 745 (C. C. A. 8th). His abandonment and rejection of burdensome and onerous property is the abandonment and rejection of the creditors which he represents. If the creditors disapprove of the abandonment, they have the right to register objection by appropriate court action. If they do not register their objection, they thereby approve, in effect, what the trustee has done. Certainly the creditors, acting through the trustee, cannot by rejection and abandonment of property throw back the title thereto to an unwilling bankrupt, together with all its attendant obligation from which the bankrupt sought discharge. If such is the law, then the real purpose of the Bankruptcy Act cannot be accomplished. Then, too, if such could be done it would enable the creditor to withdraw or exclude his claim from the effect of a discharge. Certainly it cannot be said that personal property which is subject to the lien of a chattel mortgage can be abandoned by the trustee because it is burdensome and onerous

and thus cast back upon the shoulders of the bankrupt the obligation to pay the chattel mortgage debt. Neither can the trustee abandon a real property asset subject to mortgage and so throw back upon the bankrupt the title thereto, together with all the mortgage obligation, unless the bankrupt should choose to accept it. Property which is the subject of judgment lien might be abandoned by the trustee, but certainly by so doing it cannot be said that the title reverts to the bankrupt and with it the obligation to pay the judgment. If such is the law, the policy of the Bankruptcy Act to discharge the bankrupt from his debts and liabilities and enable him to take a fresh start would, in most cases, never be accomplished. It is respectfully submitted that ownership as distinguished from title to property can only be said to exist where the owner exercises some rights pertaining thereto.

There is no proof in this case which warrants the conclusion that petitioner was the legal owner of the stock in question at the time the assessment was made. On the application to strike the answer, the plaintiff, respondent herein, submitted an affidavit which appears on page 25 of the transcript of record. There is no proof in that affidavit that the defendant was the owner of the stock in question. There is merely a statement of the particulars of the suit upon which the plaintiff hoped to succeed. If, however, the statement in that affidavit can be taken to be a proof of title or ownership, the affidavit which was filed on behalf of the defendant, petitioner herein (R. 33), presents facts which refute the allegations of ownership as a matter of law.

VI.

CONCLUSION.

It is, therefore, respectfully submitted that in consideration of the facts of this case and the law applicable thereto, it should be determined that petitioner herein is not liable for the payment of the claim of respondent as set forth in the complaint filed in this suit, and that the judgments of the District Court and of the United States Circuit Court of Appeals for the Third Circuit should be reversed.

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